Goddard

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: National Hazard Control Corp.

File: B-237194

Date: February 9, 1990

Thomas W. Kolter, for the protester.
S. Lane Tucker, Esq., Office of General Counsel, General Services Administration, for the agency.
V. Bruce Goddard, Esq., James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the decision.

DIGEST

Agency may determine individual surety unacceptable, without discussions, where the agency reasonably determines that the surety's claimed equity in jointly-owned real estate, which the surety listed on his SF-28, Affidavit of Individual Surety, is not an asset that should be considered in determining the surety's net worth and, absent this asset or the protester's identification of any other acceptable assets, the surety has insufficient net worth to cover the potential bond obligations.

DECISION

National Hazard Control Corp. (National) protests the rejection of its bid and award of a contract to Pacific Ascorp under invitation for bid (IFB) No. 9PX-1P-89-020, issued by the General Services Administration (GSA), for asbestos abatement at the Chet Holifield Federal Building, Laguna Niguel, California.

We deny National's protest.

National submitted the low bid in response to the IFB. National's bid was rejected because one of the two individual sureties who executed National's bid bond did not show sufficient assets to meet its bond obligations.

Award was made to Pacific Ascorp on August 11, 1989, and by letter dated September 1, 1989, National was informed of the award and the fact that GSA found National's bid nonresponsive. By letter dated September 7, Benefax Surety

Corporation, National's bonding agent, filed an agency-level protest with GSA, in response to which GSA suspended contract performance. Later, GSA authorized performance but did not respond to the protest. National filed a protest at our Office on September 29.

GSA argues that National's protest is untimely because it was not filed until September 29, more than 10 working days after National knew its basis of protest. GSA argues that the Benefax September 7 letter to GSA cannot serve as an agency-level protest--which would make National's later protest to GAO timely--because Benefax was not an interested party to file a protest.

Although it is true Benefax is not an actual or prospective bidder on this solicitation and is, therefore, not an interested party, see 4 C.F.R. §§ 21.0(a) and 21.1(a) (1989), Benefax's September 7 letter to GSA invoked our Bid Protest Regulations and stated that it was requesting relief on National's behalf. GSA apparently accepted the September 7 letter as a protest and issued a stop work order to Pacific Ascorp. Although GSA argues that neither Benefax nor National has submitted evidence that Benefax is National's legal agent, we are unaware of any requirement that a protester needs to make any further showing that another party is its agent for purposes of filing a protest, where the protester acknowledges that the party that filed the protest on its behalf did indeed act on its behalf. See Waukeska Alaska Corp.; VECO Inc., B-229918; B-229918.2, Apr. 27, 1988, 88-1 CPD ¶ 412, at 1, f.n.1. Under these circumstances, Benefax's September 7 protest on National's behalf was a timely agency-level protest and, accordingly, National's subsequent protest letter to GAO is timely.

National submitted bid bonds backed by two individual sureties, one of whom, Gary H. Lindgren, had included the value of his interest in jointly-owned real estate as part of his net worth. The SF 28, Affidavit of Individual Surety, which each surety was required to complete, called for a listing of assets, liabilities, and net worth and included line items for the "fair value of solely-owned real estate" and the "fair value of all solely-owned property other than real estate." The SF 28 instructed sureties not to include property exempt from execution and sale for any reason, including the homestead exemption. Mr. Lindgren claimed a total net worth of $561,620 of which $303,878, was included under the line item "fair value of all solely-owned real estate." However, under a subsequent explanation in the SF 28, Mr. Lindgren stated that the above $303,878 represented "equity in jointly-owned real estate."

The contracting officer recalculated Mr. Lindgren's net worth by excluding the value of the jointly-owned real estate, $303,878, and by subtracting the amount of his other outstanding surety obligations, $375,642.84, so that Mr. Lindgren showed a negative net worth. Since the solicitation required at least two individual sureties who had sufficient net worth to equal or exceed the penal amount of the bond, GSA contends that National was not responsible.

National contends that the rejection of its bid was improper, as the acceptability of a bid bond surety relates to responsibility, not responsiveness, and GSA should have allowed National to explain the surety's net worth statement after bid opening to show it was responsible. In this regard, National states that it could have provided a consent from the surety's co-owners of the jointly-owned property.

In reviewing the acceptability of a proposed individual surety, the contracting officer has broad discretion, and absent bad faith or the lack of any reasonable basis for his or her determination, the contracting officer may decide what specific financial qualifications to consider in determining whether the surety is responsible. See Southern California Eng'g Co., Inc., B-234515.2, Aug. 21, 1989, 89-2 CPD ¶ 156. However, since the question of whether an individual surety has identified sufficient assets to be considered acceptable is a matter of responsibility, the contracting officer should ordinarily solicit and consider information on this issue any time before award.1/ T&A Painting Inc., 66 Comp. Gen. 214 (1987), 87-1 CPD ¶ 86; Norse Construction, Inc., B-216978, Feb. 25, 1985, 85-1 CPD ¶ 232. Compare Seaworks, Inc., B-226631.2, Dec. 22, 1989, 89-2 CPD ¶ 581 (contracting officer need not request additional information where information of record casts legitimate doubts on the integrity and credibility of the individual sureties).

Here, the impetus for GSA's rejection of Mr. Lindgren as an individual surety was GSA's view that "equity in jointly-owned real estate" was not an asset that could be considered in determining his net worth and acceptability. GSA's concern as to the acceptability of this asset seems reasonable. In this regard, there are circumstances where jointly-owned real estate may not be subject to lien, or

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1/ Effective February 26, 1990, Federal Acquisition Regulation § 28.203 (FAC 84-53), requires individual sureties to pledge specific acceptable assets and provide a security interest in the pledged assets with the bond.

execution thereof, should the surety not fulfill his bond obligations. See, e.g., II Tiffany Real Property §§ 425, 441 (3rd ed.) Moreover, as indicated above, the directions on the SF-28 only solicited the value of the individual surety's "solely-owned" property or real estate as assets relevant in determining his or her net worth. Finally, we note that FAR § 28.203-2(c)(iii) (FAC 84-53), effective Feb. 26, 1990, lists as one type of unacceptable asset, for purposes of pledging by an individual surety, "real property owned concurrently regardless of the form of co-tenancy (including joint tenancy, tenancy by the entirety and tenancy in common, except where all co-tenants agree to act jointly.)"

Therefore, we find reasonable the contracting officer's concerns about Mr. Lindgren's listing of his interest in jointly-owned property on SF-28, and do not disagree with his deletion of this asset in determining that Mr. Lindgren did not have sufficient net worth to be an acceptable surety. Since the protester has not identified any other assets that could be considered in determining Mr. Lindgren's net worth, we will not question GSA's decision to reject, without discussions, Mr. Lindgren as an individual surety. See T&A Painting Inc., 66 Comp. Gen. 214, supra; Norse Construction, Inc., B-216978, supra.

National argues that it could have obtained the "consents" of the joint owners of the property in question if it had been asked. However, we agree with GSA that the supply of such consents by the joint owners of the surety's jointly-held property would be tantamount to adding them as sureties, which is not permitted after bid opening. Simone Construction Group, B-233012, Oct. 17, 1988, 88-2 CPD ¶ 359.

Under the circumstances, we do not question GSA's determination that Mr. Lindgren's was an unacceptable surety. Therefore, the rejection of National was proper.

James F. Hinchman
General Counsel